BANK BUMIPUTRA MALAYSIA BHD.

v.

SAL ENTERPRISE SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO: D2-23-3570-1986]
24 MAY 1994

PRACTICE & PROCEDURE: Application to amend statement of defence - Inclusion of counterclaim in proposed amended defence - Whether proposed counterclaim exceeded limitation period - Application not made within time limits allowed - Whether Court empowered to grant leave to make application - Whether proposed amendment in the nature of an equitable set off - Whether limitation applies.

The plaintiff commenced this action on 25 October 1986 claiming a sum allegedly due on an overdraft facility granted to the first defendant and guaranteed by the second, third and fourth defendants. The common defence was that, in breach of the terms and conditions of the facility agreement, the plaintiff had failed to release the whole of the facility to the first defendant.

On 4 June 1993 the defendants, except the third defendant, applied to amend the statement of defence *inter alia* to plead a counterclaim for damages as a result of the plaintiff's breach. It was submitted on behalf of the defendants that the proposed counterclaim was within the period of limitation allowed for that claim at the time this action was commenced and accordingly under s. 31 of the Limitation Act the Court should grant the defendants leave to amend the pleadings by bringing in the counterclaim.

The plaintiff on the other hand argued that to do so would amount to depriving the plaintiff of its rightful defence to the counterclaim namely that it is time barred. The learned Senior Assistant Registrar allowed the application and the plaintiff appealed.

On appeal, the defendants went on to submit further that the sum claimed by the plaintiff including interest would exceed the amount sought by the defendants to be claimed in the proposed counterclaim and consequently there would be no overplus and accordingly the application should be allowed inasmuch as the amendment proposed would then operate as a defence.

Held:

[1] It would have been perfectly in order and the defendants right to introduce the counterclaim within the time provided for service of the defence. The defendants having failed so to do that right is gone.

[2] Under the provisions of O. 20 r. 5 of the Rules of the High Court 1980 (RHC 1980), the amendment may only be allowed in the first place if the cause of action sought to be added arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. The parties so applying are the defendants but no cause of action has hitherto been pleaded by the defendants and so there is no question of the defendants claiming relief under a cause of action. Accordingly the relief provided for in subrule (5) of O. 20 r. 5 RHC 1980 is not available to the defendants.

[3] The amendment the defendants were finally seeking related to the same transaction and appeared to be in the nature of an equitable set off or an equitable defence in diminution or extinction of the plaintiff's claim to which limitation does not apply.

[4] The defendants' application should be allowed subject to the defendants making no reference to counterclaim in the amendment and subject further to the amount claimed therein being pleaded by way of diminution of the plaintiff's claim and not by way of overplus.

[Order of SAR set aside. Defendants granted leave to amend subject to conditions aforesaid. No order as to costs].

Cases referred to:

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 MLJ 230 ***(refd)***

Henriksens Rederi A/S v. THZ Rolimpex (CA) [1974] 1 QB 233 ***(foll)***

Walker v. Clements [1850] 15 QB 1046 p. 1049 ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6, 31
Rules of the High Court 1980, O. 20 r. 5(2)(5), O. 15 r. 2(1), 3(3), O 18 r. 2(1)
Limitation Act 1939, s. 28 (UK)
Sale of Goods Act 1893, s. 53 (UK)
Supreme Court of Judicature Act 1873, s. 24(2)(3)(UK)
Supreme Court of Judicature (Consolidation) Act 1925, ss. 38, 39 (UK)

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 34 (1960), pp. 396, 411
Precedents of Pleadings, Bullen & Leake's, 3rd Edn., (1868), p. 679

For the plaintiff - Azhar bin Arman Ali; M/s Wan Marican, Hamzah & Shaik
For the defendant - P. S. Khoo; M/s P.S. Khoo & Associates.

JUDGMENT

Richard Talalla J:
In this action which was commenced on 25 October 1986 the plaintiff claimed RM 333,947.99 being a sum allegedly due as at 31 May 1986 under an overdraft facility granted by the plaintiff to the first defendant and guaranteed by the second, third and fourth defendants. The common defence filed on 25 October 1987 was that the plaintiff failed to release the whole of the facility to the first defendant and had thereby breached the terms and conditions of the facility which the plaintiff had itself imposed and therefore the said terms and conditions could not be enforced by the plaintiff against the defendants.

On 4 June 1993 the defendants, except the third defendant who has since been adjudicated a bankrupt, (the defendants) by summons returned before the learned Senior Assistant Registrar (the SAR) applied for an order that the defence be amended in terms of a draft which evidenced no amendment to the defence save and except some typing errors but contained a counterclaim stating for the first time that by reason of the plaintiff's breach as pleaded in the defence the company had suffered damage to the value of nearly RM521,000 as therein particularised and accordingly claiming damages in that sum. The plaintiff objected to the application arguing that the alleged breach by the plaintiff had occurred more than six years before the said application and praying in aid the provisions of s. 6 and 31 of the Limitation Act 1953. Both parties relied on O. 20 r. 5(5) of the Rules of the High Court 1980 (the Rules) and the decision of the Supreme Court in *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 MLJ 230. It was submitted on behalf of the plaintiff that the said Order was not available to the defendants in the circumstances and the said decision did not apply. The SAR allowed the application. The plaintiff appealed. Before me Counsel for the defendants relied on *Henriksens Rederi A/S v. THZ Rolimpex* (CA) [1974] 1 QB 233. At pages 245 and 246 Lord Denning MR stated as follows:

> In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a defence and one which is in the nature of a cross-claim. When a defendant is sued, he can raise any matter which is properly in the nature of a defence, without fear of being met by a period of limitation. No defence, properly so called, is subject to a time-bar. ...
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> A cross-claim may be made in a separate action, or it may be made by way of set off or counterclaim. But on principle it is always subject to a time-bar. If he raises it as a "claim" by way of set off or counterclaim the law is governed by s. 28 of the Limitation Act 1939, which says:
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> > For the purposes of this Act, any claim by way of set off or counter-claim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set off or counterclaim is pleaded.

Section 31 of our Limitation Act is in *pari materia* with s. 28 of the English Act above referred to. Bearing in mind that it was not a defence but a counterclaim which the defendant was seeking to introduce I could not see in the light of the above *dicta* how the said case could be said to assist the defendants.

It was submitted on behalf of the defendants that the proposed counterclaim was within the period of limitation allowed for that claim at the time this action was commenced and accordingly under s. 31 the Court should grant the defendants leave to amend the pleadings by bringing in the counterclaim. The plaintiff on the other hand argued that to do so would amount to depriving the plaintiff of its rightful defence to the counterclaim namely that it is time barred. The mischief that s. 31 appears to provide against is a plaintiff trying to steal a march on a defendant by waiting till the last moment to file his claim in Court and upon a defendant then seeking to counterclaim, saying that the defendant is time barred. As submitted by Counsel arguing successfully in *Walker v. Clements* [1850] 15 Q.B. 1046 at 1049:

> ... it was thought right that the staleness of the demand should operate equally in favour of both parties. Any other view would lead to this

> injustice; that the defendant might not bring an action on his claim, knowing that the plaintiff had a claim; whereas the plaintiff, by issuing his writ and not declaring till the defendant's right of action was barred, might avail himself of his own claim and get rid of the demand against him.

As I understand the application of s. 31 it would have been perfectly in order and the defendants' right to introduce the counterclaim within the time required by the rules which I gather by reference to O. 15 r. 2(1) and 3(3) as read with O. 18 r. 2(1) is the time provided for service of the defence. The defendants having failed so to do that right is gone. Now the defendants can only do so by leave of the Court assuming of course that the Court is empowered to grant such leave. Whether or not the Court is so empowered calls for a consideration of O. 20 r. 5(2) & (5) of the Rules, which are set out as follows:

> 5(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just do so.
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> 5(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

By reference to the subrules abovestated and the *Hock Hua Bank* case abovestated the amendment may only be allowed in the first place if the cause of action sought to be added arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. The parties so applying are of course the defendants but no cause of action has hitherto been pleaded by the defendants and so there is no question of the defendants claiming relief under a cause of action. Accordingly as I see it the relief provided for in subrule (5) is not available to the defendants. Indeed it would appear not to be available to any defendant; only to a plaintiff that is to say a plaintiff either by way of original action or by counterclaim. Here the defendants have yet to be plaintiffs. As I discern from the terminology of subrule (5) any attempt to apply it to a defence is like trying to fit a square peg in a round hole.

In the light of the foregoing, the defendants then submitted that the sum claimed by the plaintiff including interest would at that point of time exceed the amount sought by the defendants to be claimed in the proposed counterclaim and consequently there would be no overplus and accordingly it was submitted that the application should be allowed inasmuch as the amendment proposed would then operate as a defence. In the light of this new development it became necessary to refer further to the decision of the learned Master of the Rolls in *Hendriksens's* case. At pages 246 to 249 the learned Judge continued:

> The word "set off" is not defined in this section 28: but I think it is used to denote a legal set off and not an equitable set off. That is, a legal set off as permitted by the statutes of set off [2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 1, 5]. These apply only "where the claims on both sides are liquidated debts or money demands which can be ascertained with certainty at the time of pleading": see Bullen & Leake's **Precedents of Pleadings,** 3rd Edn. (1868), p. 679. These cross-claims must arise out of separate transactions. It is so stated in **Halsbury's Laws of England** 3rd Edn., Vol. 34 (1960), p. 396. It there says that the right of set off is:
>
> > ... the right to plead a debt due from the plaintiff, **arising from a separate transaction**, in reduction or extinction of the plaintiff's claim ...
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> Note the emphasis which the editors put on there being separate transactions. If there is no separate transaction, but only opposing demands arising out of the same transaction, then no question of set off, properly so called, arises. The editors say in a note (1) on the same page:
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> > Where opposing demands are connected by originating in the same transaction the balance has always been regarded by the common law as the debt so that no question of set off arises.

For this proposition they cite Lord Hansfield in *Green v. Farmer* [1768] 4 Burr. 2214, 2221, when he said:

> Where the nature of the employment, transaction, or dealings necessarily constitutes an account consisting of receipts

and payments, debts and credits; it is certain that the balance can be the debt ...

The word "counterclaim" is not defined in s. 28, but, following Halsbury again, 3rd Edn., Vol. 34, p. 411, I think it is:

> ... any claim that could be the subject of an independent action. It is not confined to money claims ... and ... it need not relate to or be connected with the original subject of the cause or matter.

Such being the meaning of "set off" and "counterclaim", I would state the effect of s. 28 in this way.

Where the plaintiff owes the defendant a debt **arising from a separate transaction**, the defendant can raise it by way of set off. If it is time-barred at the date when the plaintiff issues his writ, it is time-barred still. But if it is not time-barred at the time when the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time. That was decided in *Walker v. Clements* [1850] 15 Q.B. 1046, which is given statutory effect by s. 28. In that case, as in every legal set off, the debts arose out of separate transactions.

Where the defendant has a cross-claim for **damages arising from a separate transaction**, he can either bring a separate transaction for it: in which case he is subject to the ordinary time bar. Alternatively, he can raise it by way of counterclaim. Before 1939, if he was time-barred for a separate action, he was time-barred for a counterclaim: because the counterclaim only dated from the time of its delivery: see *Lowe v. Bentley* [1928] 44 TLR 388. But by s. 28 a counterclaim, which arises out of a **separate** transaction, is on the same footing as a set off. If it is not time-barred at the time the plaintiff issues his writ, the defendant can raise it in opposition to the plaintiff's claim without being affected by any intervening running of time.

All this is when the set off or counterclaim arises out of a **separate** transaction. When it does not arise out of a separate transaction but out of the **same** transaction, then it is not within s. 28 at all. It can be raised, as I will soon show, as a matter of defence, either legal or equitable, so as to reduce or extinguish the claim and being a matter of defence, it is not subject to a time-bar. Such is the law in the United States where a cross-claim arising out of the same transaction is described as a right of recoupment. It has been held by the Supreme Court that:

> Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely: see *Bull v. United States* [1935] 295 US 247.

Claim arises out of the same transaction.

Our law has divided cross-claims (which arise out of the same transaction as the claim) into two categories:

First: when the cross-claim goes directly in diminution or extinction of the claim such as cases where goods are sold with a warranty, and by reason of the breach of warranty the goods are worth less than the contract price; or, cases where work and labour are expanded on a building and, by reason of defects, the work actually done is worth less than the contract price.

In such case it is plain that the plaintiff, not having completed the agreed work in accordance with the contract, is not entitled to the whole of the agreed sum. He ought not, therefore, to recover judgment for that sum, but only for the lesser sum. When the defendant says: "You have not done the work up to the agreed standard, and you are, therefore, not entitled to the agreed price," that is matter of defence in law and not of set off or counterclaim. This is borne out by the words of Parke B. in the leading case of *Mondel v. Steel* [1841] 8 M & W 858, 871-872:

> ... it is competent for the defendant ... not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to **defend himself** by showing how much less the subject matter of the action was worth, by reason of the breach of contract ...

So far as contract for sale of goods is concerned, a like rule is now statutory: see s. 53 of the Sales of Goods Act 1893. The buyer can set up a breach of warranty in diminution or extinction of the price. That is clearly a matter of defence. So far as contract for work and labour are concerned, it is not statutory, but it is also, I am satisfied, a matter of defence in law and not merely set off or counterclaim. Though, to be true, it is not incumbent on the defendant to set it up by way of defence. He can, if he pleases, pay the agreed price and bring a separate action of his own for the diminution in value and any other damage that he has suffered: see *Davis v. Hedges* [1871] LR 6 QB 687.

Thus far I have considered only the amount by which the subject matter is of less worth owing to the breach of contract. That is a

matter of defence in law. In the old days it could be raised under the plea of non assumpsit or never indebted - which shows that it was a defence in law. In modern times, it was a defence which could be taken in the county Court without special notice: see *Bright v. Rogers* [1917] 1 K.B. 917. This defence is not subject to any time-bar.

Secondly: when the cross-claim does not reduce the **value** of the goods sold or the work done, but causes other damage; such as cases where goods are delayed in delivery and the buyer has a cross-claim for damages for delay; or where a contractor who is employed to clean windows negligently breaks the leg of a chair. In former times such damages could only be claimed in a separate action: see *Mondel v. Steel*, 8 M & W 858, 870-872, and would no doubt be subject to a time-bar, where appropriate. Since the Judicature Act 1973, however, these damages can be set up by way of an equitable set off in diminution or extinction of the claim - leaving any over-plus to be the subject of a counterclaim. The scope of equitable set off was considered by Lord Lyndhurst LC in *Rawson v. Samuel* [1841] 1 Cr. & Ph. 161, 178; recently by this Court in *Morgan & Son Ltd. v. Martin Johnson & Co. Ltd.* [1949] 1 KB 107 and *Hanak v. Green* [1958] 2 QB 9. It is available whenever the cross-claim arises out of the same transaction as the claim; or out of a transaction that is closely related to the claim.

Although it is often described as an "equitable set off," it would, I think, be more accurately stated to be an "equitable defence": see section 24 (2) (3) of the Supreme Court of Judicature Act 1873 [36 & 37 Vict. c. 66] and ss. 38 and 39 of the Supreme Court of Judicature (Consolidation) Act 1925 [15 & 16 Geo. 5, c. 49]. When the contractor sues for the contract price, the employer can say to him:

> You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me.

It is on a par with the case of a defendant who says that the plaintiff has repudiated the contract by an anticipatory breach, or that the plaintiff has been guilty of a breach going to the root of the contract. On accepting it, the defendant is discharged from further performance and can set up the breach as a defence. So also with any breach by the plaintiff of the self-same contract, the defendant can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to a time-bar.

The amendment the defendants were finally seeking no doubt related to the same transaction and appeared to be in the nature of an equitable set off or, as the learned Master of the Rolls preferred to call it, an equitable defence in diminution or extinction of the plaintiff's claim to which as gathered from the *dicta* set out above limitation does not apply.

Counsel for the plaintiff in the light of the latest submission by Counsel for the defendants did not object to the application to amend the defence there being no question of a counterclaim being introduced for any overplus.

I therefore allowed the defendants' application subject to the defendants making no reference to counterclaim in the amendment and subject further to the amount claimed therein being pleaded by way of diminution of the plaintiff's claim and not by way of overplus. Accordingly the order of the SAR was set aside and in place thereof it was ordered that the defendants do have leave to amend their defence subject as aforesaid. By consent there was no order as to the costs of the appeal, the costs of the application were to be in the cause and there was liberty given to apply in respect of the settlement of the amended defence.